Supreme Court, U. S.
FILED
APR 11 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1594

PATRICIA BOWEN,

Appellant,

VS.

H. L. BOWEN,

Appellee.

ON APPEAL FROM THE TEXAS COURT OF CIVIL APPEALS 11TH SUPREME JUDICIAL DISTRICT

JURISDICTIONAL STATEMENT

WILLIAM D. DUPREE
Attorney for Appellant
West Texas Legal Services
100 Main Street
Lawyers Building
Fort Worth, Texas 76102
(817) 336-3943

TABLE OF CONTENTS

Table of Authorities.....iii

Opinions Below.....2

Grounds of Jurisdiction.....2

Statutes Involved.....4

Questions Presented.....7

Statement of the Case.....8

Substantiality of Federal Questions....11

Conclusion.....31

Certificate of Service.....32

Appendix

A-1 Judgment of 326th District Court, Taylor County, Texas, Decree of Divorce rendered January 21, 1977..A1

A-2 Judgment of the 326 District Court, Taylor County, Texas, modifying conservatorship, rendered November 9, 1978.....A8

B Opinion and judgment of the Texas Court of Civil Appeals, 11th Supreme Judicial District, rendered May 24, 1979.....A17

C Order of the Texas Supreme Court, denying Application for Writ of Error, rendered October 31, 1979.....A33

Order of the Texas Supreme Court, denying Motion for Rehearing, rendered January 30, 1980.....A33

D. Texas Family Code (Supp. 1980)
Section 11.15.....A34
Section 14.07.....A34
Section 14.08.....A35

E Notice of Appeal to the Supreme Court of the United States, filed February 21, 1980.....A39

TABLE OF AUTHORITIES

CASES:

A. B. Small Co v. American Sugar Ref. Co. 267 U.S. 233 (1925.....18

Addington v. Texas, 99 S. Ct. 804 (1979.....25,28

Alsager v. Discourt Court of Polk County, Iowa, 406 F.Supp. 10 (S.D. Iowa 1975) aff'd 545 F.2d 1137 (8th Cir. 1976).....14,16

Boriak v. Boriak, 541 SW 2d 237 (Tex. Civ. App. - Corpus Christi, 1976, writ dism'd).....20

Grayned v. City of Rockford, 408 U.S. 104 (1972).....18

Griswold v. Connecticut, 381 U.S. 479 (1965).....12,13

Hall v. Harris County Child Welfare Unit, 533 SW 2d 121 (Tex. Civ. App. Houston [14th Dist.] 1976, no writ)...28

Johnson v. Johnson, 536 SW 2d. 620 (Tex. Civ. App. Tyler, 1974, no writ).....19

In the interest of G.M., et al, Children, 23 Tex. Sup. Ct. J. 262 (decided March 19, 1980).....29

May v. Anderson, 345 U.S. 528 (1953).....13

Meyer v. Nebraska, 262 U.S. 390 (1923).....13,16

Pierce v. Society of Sisters, 268 U.S. 510 (1925).....13

Roe vs. Wade, 410 U.S. 959 (1973.....14,16

Sims v. State Department of Public Welfare, 438 F.Supp. 1179 (S.D. Tex. 1977), reversed on other grounds, sub nom Moore v. Sims, 99 S.Ct. 2371 (1979).....16

Skinner v. Oklahoma, 316 U.S. 536 (1942).....13

Stanley v. Illinois, 405 U.S. 645 (1972).....13

State v. Addington, 557 SW 2d 511 (Tex. 1977).....27

State v. Addington, 588 SW 2d 569 (Tex. 1979).....28

State v. Turner, 336 SW 2d 563 (Tex. 1977).....27

Tye v. Tye, 532 SW 2d 1241 (Tex. Civ. App. - Corpus Christi, 1975, no writ).....19

Wilkinson v. Evans, 515 SW 2d 734
(Tex. Civ. App. - Dallas,
writ ref'd, n.r.e.).....19

Wisconsin v. Yoder,
406 U.S. 205 (1972).....14

STATUTES:

Texas Family Code (Supp. 1980)

Section 11.15.....4,8,12,
24,26,27,28

Section 14.07.....4,5,7,
12,15,16

Section 14.08.....4,5,9,11

28 U. S. C. §1257(2).....4

MISCELLANEOUS AUTHORITIES:

Goldstein, Freud and Solnit, Beyond
the Best Interests of the Child
(1973).....22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. _____

PATRICIA BOWEN,
Appellant

VS.

H. L. BOWEN,
Appellee

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, Appellant, Patricia Bowen, files this statement of the basis upon which it is contended the Supreme Court of the United States has jurisdiction to review the judgment entered by the Texas Supreme Court affirming the decision of the Texas Court of Civil Appeals, 11th Supreme Judicial District in this case, and

why the United States Supreme Court should exercise jurisdiction herein.

OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals, 11th Supreme Judicial District, sitting at Eastland, Texas, appears in Cause No. 5306, styled In Re: P. Y. B. and S. L. B., and is included herein as Appendix B, infra. This opinion has not yet been reported in the Reporter Systems. The judgment of the 326th District Court in and for Taylor County, Texas, and the order of the Texas Supreme Court are set forth in Appendix A and Appendix C, respectively, infra.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action to modify the managing conservatorship of children. The Appellee, Hubert Lee Bowen, Jr., filed a motion seeking modification of a previous court order appointing Appellant herein, Patricia Jeanette Bowen, as managing conservator of her children. Appellee filed this motion within one year of

the entry of the previous decree.

Upon a jury verdict, the District Court of Taylor County, Texas, entered a judgment modifying the managing conservatorship in favor of Appellee on November 9, 1978. The judgment was rendered in disregard of the court appointed state social worker who investigated the circumstances of the parents and determined the children's best interest would be served to remain with Appellant, and the child psychologist who testified that Appellant was the psychological parent of the children and that a change of custody would be traumatic to the children. Upon appeal to the Texas Court of Civil Appeals, 11th Supreme Judicial District, the District Court's decision was affirmed on May 24, 1979.

Appellant's Application for Writ of Error and her Motion for Rehearing were eventually denied on January 30, 1980, by the Texas Supreme Court, the effect being an affirmation

of the decision rendered by the Texas Court of Civil Appeals. It is, therefore, the final judgment of the highest court of Texas in which a decision could be had.

A timely notice of appeal was filed on February 21, 1980, in the Supreme Court of Texas, and the Eastland Court of Civil Appeals. The jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C. Section 1257(2).

STATUTES INVOLVED

The applicable statutes involved in this appeal are Sections 11.15, 14.07, and 14.08 of the Texas Family Code, (1980 Supp.).

The relevant parts of the Texas Family Code are as follows. The statutes are set out in their entirety in Appendix D, infra.

Section 11.15. Findings

> The Court's findings shall be based on a preponderance of the evidence under rules generally applicable to civil cases.

Section 14.07. Best Interest of the Child

(a). The best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession, and support of and access to the child...

(b). In determining the best interest of the child, the court shall consider the circumstances of the parents...

Section 14.08. Modification of Order

(a). A court order or the portion of a decree that provides for the support of a child or the appointment of a conservator or that sets the terms and conditions of conservatorship for, support for, or access to a child may be modified only by the filing of a motion in the court having jurisdiction of the suit affecting the parent-child relationship...

(c). After a hearing, the court may modify an order or portion of a decree that:

(1). designates a managing conservator if the circumstances of the child or parent have so materially and substantially changed since the entry of the order or decree to be modified that the retention of the present managing conservator would be injurious to the welfare of the child and that the appointment of the new managing conservator would be a positive improvement for the child...

(d). If the motion is filed for the purpose of changing the designation of managing conservator and is filed within one year after the date of issuance of the order or decree to be modified, there shall be attached to the motion an affidavit executed by the person making the motion. The affidavit must contain at least one of the following allegations along with the supportive facts:

(1). That the child's present environment may endanger his physical health or significantly impair his emotional development....

(e). On the filing of a motion to which the provisions of Subsection (d) of this section apply, the court shall deny the motion and refuse to schedule a hearing unless the court determines, on the basis of the affidavit, that adequate facts to support an allegation listed in Subdivision (1) or (2) of Subsection (d) of this section are stated in the affidavit. If the court determines that the facts stated are adequate to support an allegation, a time and place for the hearing shall be set.

QUESTIONS PRESENTED

I.

Whether the "Best Interest" of the child test, provided for in Subsections (a) and (b) of Section 14.07, Texas Family Code, is constitutionally

vague on its face and unconstitutional as applied to Appellant.

II.

Whether the "preponderance of the evidence" standard under Section 11.15 of the Texas Family Code used to determine the "substantial and material change of circumstances" in a child custody modification suit is violative of the due process requirement, because the "clear and convincing evidence" standard should be applied to such determination.

STATEMENT OF THE CASE

Appellant had previously divorced Appellee on January 21, 1977, at which time the trial court appointed her as managing conservator of the children of this marriage. (Appendix A-1).

On September 8, 1977, within one year of the aforementioned divorce decree, Appellant's husband filed a suit to modify Appellant's managing conservatorship, seeking the managing conservatorship himself.

Since this suit was filed within one year of the previous decree, it was subject to Subsections (d) and (e) of Section 14.08 of the Texas Family Code, which are set out above.

Appellant filed her answer pleadings and motions alleging that this suit was brought within one year of a previous custody decree and contesting the sufficiency of Appellee's affidavit which would tend to show that a "substantial and material change of circumstances" has occurred to merit a change of conservatorship.

No hearing was held on the preliminary matter as is required by Section 14.08(e) of the Texas Family Code. At time of the trial on the merits which took place in August, 1978, almost a year after Appellee filed his emergency modification suit, the trial court denied Appellant's request for this hearing. When the cause came on for trial on

its merits, Appellant requested that Appellee establish the "material and substantial change of circumstances" by the "clear and convincing evidence" standard on the basis of the due process requirement.

Appellant also objected to the court's charge and special issue submission in that the definition and test of the "Best Interest of the Child" as provided for in Section 14.07 of the Texas Family Code was unconstitutionally vague and unspecific. All of Appellant's requests and objections, including a motion to grant a directed verdict in favor of Appellant, were denied by the trial court. Finally, on November 9, 1978, consistent with the jury verdict, the trial court replaced Appellant as managing conservator, appointing Appellant's former husband, H. L. Bowen, Appellee herein, as managing conservator of the children.

All complaints made by Appellant have been re-urged at every

stage of the appellate process. However, the Texas Court of Civil Appeals held that since "this appeal concerns a change of conservatorship under Section 14.08, Texas Family Code (Supp. 1978)", the clear and convincing test was not applicable and that the "Best Interest of the Child" test was constitutionally valid.

SUBSTANTIALITY OF FEDERAL QUESTION

This appeal presents important and substantial federal questions in that annually all Texas citizens with children, who are involved in issues of divorce, custody, change of custody, termination of parental rights, or adoption under the Texas Family Code are subjected to the vague definition of the "Best Interest of the Child" test and an inconsistent application of the "preponderance of the evidence" standard, and as such are denied procedural due process and equal protection of the laws.

Through the parent-child relationship proceedings under the Texas Family Code, the State of Texas exercises its authority as parens patriae to protect the "Best Interest" of children. The Texas Family Code permits changes of child custody where the statute deems it in the "Best Interest" of the child to do so (Section 14.07) and by a mere "preponderance of the evidence" (Section 11.15).

The statutes which authorize these proceedings have received little scrutiny from this Court. Yet this Court has written extensively upon the sanctity of the home. The right to family integrity has its origins in the common law traditions of our culture and the collective conscience of the American people. Griswold vs. Connecticut, 381 U.S. 479 (1965). This Court also recognized a Fourteenth Amendment right to establish a home and bring up

children. Meyer vs. Nebraska, 262 U.S. 390 (1923); Pierce vs. Society of Sisters, 268 U.S. 510 (1925).

In 1953, the Court in May vs. Anderson, 345 U.S. 528, held a parent's "immediate right to the care, custody, management and companionship of minor children" to be "one of the most precious of personal liberties". This Court in Stanley vs. Illinois, 405 U.S. 645 (1972), spoke of the right of a parent to the possession and care of one's child as "essential" and "one of the basic civil rights of man". See also Skinner vs. Oklahoma, 316 U.S. 536 (1942). Reference to family integrity as a basic right of man in Stanley and Skinner, and to family privacy as a fundamental interest in Griswold has resulted in the finding that family integrity is a fundamental right emanating

from the Constitution.

For a state to infringe upon or interfere with a fundamental right, there must be a demonstration of compelling state interest. Roe vs. Wade, 410 U.S. 959, (1973); Wisconsin vs. Yoder, 406 U.S. 205 (1972); Alsager vs. District Court of Polk County, Iowa, 406 F Supp. 10 (N.D. Iowa, 1975).

A state, of course, has an interest when a child is abused and when the health and safety of a child are in jeopardy. This interest necessarily flows through divorce and custody proceedings in which it is important that the state oversee the placement of children in an environment which would promote their health, stability and welfare. But even the statutes which deal with these interests must be narrowly and precisely drawn,or they will be subject to constitutional attack and void for vagueness.

I.

This present proceeding involved a deprivation of a parent's fundamental right, but the state failed to establish a compelling state interest to justify such deprivation.

Pursuant to Section 14.07 of the Texas Family Code, the trial court gave the following special instructions to the jury:

> "Best interest of the children shall always be the primary consideration in answering the issues. In determining the best interests of the children, you should consider the circumstances of the parents."

Yet the term, "Best Interest of the Child" has been defined neither by the statute nor by the courts of Texas. In fact, it is impossible to define such an all-inclusive and often-evasive term. It does not set any guidelines. Nevertheless, it gives unfettered discretion to a judge or jury. In the hands of untutored people, it is an all-powerful

weapon that can be used for proper as well as improper purposes. Therefore, the "Best Interest of the Child" test as applied in the present proceeding and cited in Section 14.07 of the Texas Family Code should be held invalid and unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States for the following reasons:

1. Application of such a vague standard without at least a concommitant requirement of clear and convincing evidence constitutes deprivation of the fundamental right to family integrity without due process of law. Roe vs. Wade, supra; Meyer vs. Nebraska, supra; Alsager vs. District Court of Polk County Iowa, supra; Sims vs. State Department of Public Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977). Keeping and living with one's own children is the source of family

integrity, pride, joy and happiness. This integrity which generates stability and unhampered growth of children, also requires that such custody changes not be made for trivial reasons. An abrupt change in child custody is a traumatic experience to the parent who loses the child through no fault of his/her own. For in many instances the modification of a managing conservator is a de facto termination of parental rights, especially where the new managing conservator removes the child to another jurisdiction, or more affluent parent, through constant and harassing custody litigation, or litigation over visitation rights,effectively excludes a parent from the parental contact the child needs for proper development. The child is the pawn in these proceedings which ex-spouses use to vent their wrath against each other for the real and imagined wrongs perpetrated against each other

in a deteriorating marriage relationship, and it is the child that suffers in these proceedings through the instability and emotional trauma such activities generate.

2. The "Best Interest" test is unconstitutionally vague in that it fails to notify parents of the kind of conduct prescribed under the test, thereby resulting in the imposition of penalties upon parents whose only offense was in not behaving in a manner which a trial court personally and subjectively considers acceptable. Statutes of this kind have been consistently rejected by this Court where it has been found that the exaction of obedience to a rule which is so vague and indefinite as really to be no rule at all has occurred. A. B. Small Co. vs. American Sugar Ref. Co., 267 U.S. 233, 239 (1925); Grayned vs. City of Rockford, 408 U.S. 104 (1972). It has been consistently held

unconstitutionally vague if a statute does not define the activity for which sanctions may be imposed.

3. The "Best Interest" test effectively precludes a party aggrieved by a trial court order issued under the authority of the test from obtaining redress upon appeal, since in the absence of statutory definition of the test, any abuse of discretion by the trial court cannot be determined for the purposes of review. Because the trial court enjoys a large degree of discretion under this standard as construed by the Texas appellate courts, Tye vs. Tye, 532 SW2d 124 (Tex. Civ. App.-Corpus Christi, 1975, no writ); Wilkinson vs. Evans, 515 SW2d 734 (Tex. Civ. App.-Dallas, 1974, writ ref'd., n.r.e); Johnson vs. Johnson, 536 SW2d 620 (Tex. Civ. App.-Tyler, 1976, no writ), the scope and extent for review are exceedingly and unfairly narrow, so narrow in fact, that even the

most worthy appellant is constrained to find any grounds upon which he may formulate an appeal. Boriak vs. Boriak, 541 SW2d 237 (Tex. Civ. App. - Corpus Christi, 1976, writ dismissed). Appellant asserts that such a broad grant of discretionary power to the trial court makes it virtually the court of last resort and imposes an unfair burden upon potential Appellants. Such judicial mechanism deprives potential Appellants of their due process right. For this reason, the best interest standard should be declared unconstitutional.

4. The "Best Interest" test constitutes a violation of a parent's rights to equal protection of the laws, because it permits an impermissible class-based intrusion upon the family. It is most effectively and most often used to disfavor the rights of the poor parent, the non-conformist parent, the uneducated parent, the very

young parent, and those parents who are incapable, at time of trial, of providing a court-approved level of care to the child because of family disruptions, post-divorce crises, or lack of knowledge and training in proper child rearing procedures, all of which conditions are temporary and remediable.

Our society is not built upon perfection nor standardization. The strength of our society lies in its cultural pluralism and individual initiative. The "Best Interest of the Child" merely states a noble proposition. That phrase defies definition. It does not establish any guidelines. This court must halt and prevent the further use of this phrase as a standard in child custody modification proceedings, unless and until a workable definition can be developed.

5. The "Best Interest" standard permits divorced parents

(or in-laws) with an axe to grind with their ex-spouses to seek "squatters rights" by petitioning for the managing conservatorship of a child by simple means of a pleading, whether proper or improper, showing that they are economically better off, better educated, or more attractive as "the parent" for their child than the ex-spouses. And then, upon a tide of glittering evidence, the judge and jury merrily move forward to change custody of the child. Thus, the child moves about upon a tide of evidence supported only by a preponderance of the evidence and like flotsam and jetsam is here today with one parent and gone tomorrow with another, with little regard for the child's health, emotional status, stability, and above all, his sense of belonging. (See Goldstein, Freud, and Solnit, Beyond the Best Interests of the Child (1973.)

II.

At this age of increasing divorce rate and interminable battles among ex-spouses and ex-in-laws over the custody of their children subsequent to divorces, the incessant and frequent shufflings of children from one home to another upon findings of changes in the circumstances by a mere "preponderance of the evidence" poses a substantial and serious federal question based on the Due Process and Equal Protection Clauses. Virtually every American jurisdiction holds that child custody decrees, being considered an equitable remedy, are modifiable. If such child custody can be modified by a mere "preponderance of the evidence", we are seriously risking the stability and growth potential of our children and contributing to the trauma of children growing up with divorced parents. Children's psychological need for stability and sense of belonging should not

be disturbed by a mere preponderance at the whim of irresponsible parents and states.

That is why the Texas Legislature (as well as many other state legislatures) adopted a "material and substantial change of circumstances" test, before a child custody decree can be disturbed. Therefore, allowing to establish such a "material and substantial change" by a mere preponderance is a contradiction of the policy reasons. Common sense and simple logic require that a "material and substantial change" should be proved by evidence higher than the mere preponderance standard, and this requirement is further buttressed by the Due Process Clause.

As this Court has pronounced, the intermediate standard of proof, that is higher than the preponderance standard, "is no stranger to the civil law". Courts have employed this intermediate standard or clear

and convincing standard in civil cases where "fraud or some other quasi-criminal wrongdoings" are alleged, where the "interests at stake...are deemed to be more substantial than mere loss of money", where defendant has the risk of his reputation being "tarnished erroneously", or where "particularly important individual interests" are involved. Addington vs. Texas, 99 S.Ct. 1804, 1808 (1979).

Nevertheless, pursuant to Section 11.15 of the Texas Family Code, which provides that all the parent-child relationship proceedings be determined by a "preponderance of the evidence", the trial judge in the present case instructed the jury to make findings based on the preponderance of the evidence. At the trial Appellant's attorney made a timely Motion for a Higher Standard of Proof, requesting that the jury findings be "rendered upon the consideration of clear and

convincing evidence...and not by a preponderance of the evidence". Denying this motion by Appellant, the trial judge instructed the jury to adopt the preponderance test. The trial court also expressly stated in his decree that the jury verdict was based on a "preponderance of the evidence".

This standard of proof relied on by the trial court and expressly provided for in Section 11.15 of the Texas Family Code should be declared unconstitutional and invalid under the Due Process Clause for the following reasons:

1. The mere preponderance standard of proof is far short of sufficiency in the determination of a "material and substantial change of circumstances", which by definition requires a higher standard of proof. Traditionally, equitable remedies were granted on the showing of "clear and convincing" evidence. As applied to Appellant it effectuated

an unwarranted deprivation of her fundamental constitutional right to enjoy a natural parent-child relationship, and as applied to the children, it deprived them of their right to continued stability and sense of belonging in their critical stages of growth.

2. One reason why Section 11.15 of the Texas Family Code employs the preponderance standard may be explained by the traditional Texas law which held that there were only two standards of proof—"preponderance of the evidence" in civil proceedings, and "beyond a reasonable doubt" in criminal proceedings. State vs. Turner, 336 SW2d 563 (Tex. 1977); State vs. Addington, 557 SW2d 511 (Tex. 1977).

But after this Court reversed the aforementioned Texas Supreme Court decision, holding that due process requires at least a clear and convincing standard of proof in an involuntary mental commitment

case, Addington vs. Texas, 99 S.Ct. 1804 (1979), and on remand the Texas Supreme Court adopted this Court's opinion, State vs. Addington, 588 SW2d 569 (Tex. 1979), there is no longer any valid reason why Texas courts and statutes should stick to the old two-proof standards doctrine.

3. A few Texas appellate courts have adopted the "clear and convincing evidence" standard in parent-child relationship termination proceedings, despite the Section 11.15 provision of the Texas Family Code under which such termination could be determined by the preponderance standard. Hall vs. Harris County Child Welfare Unit, 533 SW2d 121 (Tex. Civ. App.-Houston [14th Dist], 1976, no writ). Very recently the Texas Supreme Court declared that the "clear and convincing evidence" standard was required to terminate parent-child relationship despite the Section 11.15 provision

of the Texas Family Code. In the Interest of G. M., et al, Children, 23 Tex. Sup. Ct. J. 262 (decided March 19, 1980). (This case is cited in full in Appendix E).

Thus, the rationale of the old Texas rule that there were only two standards of proof in legal proceedings has effectively been overruled under the due process requirement. There is no valid reason why this clear and convincing evidence standard should not be extended to the child custody modification proceedings. The very stability and emotional health of our children would mandate that we do so.

4. The Due Process Clause requires that child custody modification be determined by a standard of proof higher than a mere preponderance because parental rights and the welfare of the children involved in such proceedings are no less important as those involved

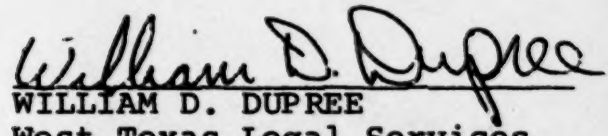
in the mental commitment or termination cases. Our children are the most precious natural resource this nation has, and through them goes the future of this country. Their stability and welfare should never be determined by a turn of a preponderance this year and a turn of a preponderance the next. Our children are important. They should never be the pawns in the adult chess game that divorced parents play. It is an imbalance of justice and fairness if less proof is required in a custody modification proceeding than is required in a mental commitment case. Surely a child is more important than Mr. Addington, who caused a change of hearts of the Justices as well as that of the evidence standard. If anything, we should require more of those who seek to disrupt a child's stability, moving him around from here today to there tomorrow upon the mere whims of a preponderance of the evidence, supported and

bolstered by a vague, undefinable Best Interest test.

CONCLUSION

For these reasons, this Court should take jurisdiction of this appeal.

Respectfully submitted,



WILLIAM D. DUPREE
West Texas Legal Services
Lawyers Building
100 Main Street
Fort Worth, Texas 76102
(817) 336-3943

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, WILLIAM D. DUPREE, Attorney for Appellant, do hereby certify that I mailed three (3) true and correct copies of the foregoing Jurisdictional Statement, with first class postage prepaid to:

Mr. Dub Burke
Attorney for Appellee
P.O. Box 392
Abilene, Texas 79604

Hon. Mark White
Attorney General
State Capitol
Austin, Texas 78711

on this 10th day of April, 1980. I further certify that all parties required to be served have been served.

William D. Dupree
WILLIAM D. DUPREE

APPENDIX A-1

IN THE COURT OF DOMESTIC RELATIONS
IN AND FOR TAYLOR COUNTY, TEXAS

IN THE MATTER OF §
THE MARRIAGE OF
PATRICIA JEANETTE BOWEN
AND HUBERT LEE BOWEN, JR. § NO 11, 210-DR
AND IN THE INTEREST OF
PATRICIA YVONNE BOWEN and
STACY LEE BOWEN §

DECREE OF DIVORCE

On the 30th day of December, 1976, the Petitioner, PATRICIA JEANETTE BOWEN, appeared in person and by attorney and announced ready for trial.

The Respondent, HUBERT LEE BOWEN, JR., appeared in person and by attorney and announced ready for trial.

The Court, having examined the pleadings and heard the evidence and argument of counsel, finds that all necessary residence qualifications and prerequisites of law have been legally satisfied, that this Court has jurisdiction of all the parties

and subject matter of this cause, and that the material allegations contained in Petitioner's pleadings are true. A jury was waived, and all matters in controversy, including questions of fact and of law, were submitted to the Court. All persons entitled to citation were properly cited.

IT IS DECREED that PATRICIA JEANETTE BOWEN, Petitioner and HUBERT LEE BOWEN, JR., Respondent, be and they are hereby divorced.

The Court finds that the parties are not now expecting another child of the marriage and that Petitioner and Respondent are the parents of the following children now under 18 years of age:

PATRICIA YVONNE BOWEN, a female, born December 5, 1974, in Abilene, Taylor County, Texas.

STACEY LEE BOWEN, a female, born December 23, 1975, in Stamford, Jones County, Texas.

The Court, having considered the curcumstances of the parents and of the children, finds that the following

orders are in the best interest of the children:

IT IS DECREED that PATRICIA JEANETTE BOWEN be and is hereby appointed Managing Conservator of the children.

IT IS DECREED that the Managing Conservator shall have all the rights, privileges, duties, and powers of a parent, to the exclusion of the other parent, subject to the rights, privileges, duties, and powers granted to any possessory conservator named in this decree.

IT IS DECREED that HUBERT LEE BOWEN, JR. be and is hereby appointed Possessory Conservator of the children.

IT IS DECREED that the Possessory Conservator shall have possession of the children as follows:

> Every Sunday of each week, with the period of possession to begin at 8:00 o'clock a.m. on Sunday and to end at 6:30 o'clock p.m. on Sunday.
>
> For a period of two weeks during the summer school vacation, during the month of June, upon 30 days written notice to the Managing Conservator.

Every other Christmas Eve, beginning with the year 1977. Every 27th, 28th and 29th days of the month of December each and every year, beginning with the year 1977.

The Possessory Conservator is hereby ORDERED to return the children to the Managing Conservator immediately at the end of each period of possession.

The Managing Conservator is hereby ORDERED to surrender the children to the Possessory Conservator at the beginning of each period of possession.

IT IS DECREED that the Possessory Conservator shall have the following rights, privileges, duties, and powers during the period of possession:

1. the duty of care, control, protection, and reasonable discipline of the children;

2. the duty to provide the children with clothing, food, and shelter; and

3. the power to consent to medical and surgical treatment during an emergency involving an immediate danger to the health and safety of the children.

IT IS DECREED that HUBERT LEE BOWEN, JR. pay to PATRICIA JEANETTE BOWEN child support in the amount of $140.00 per month, in two installments per month of $70.00 each, with the first installment being due and payable on the 7th day of January, 1977, and a like installment being due and payable on each 7th and 21st day of the month thereafter until the date any child reaches the age of 18 years or is otherwise emancipated. Thereafter, HUBERT LEE BOWEN, JR. shall pay to PATRICIA JEANETTE BOWEN child support in the amount of $70.00 per month, in two installments per month of $35.00 each due and payable on each 7th and 21st day of the month until the next child reaches the age of 18 years or is otherwise emancipated.

All payments shall be made through the Taylor County District Clerk's office, Abilene, Texas and thereafter promptly remitted to the Managing Conservator for the support of the children.

The Court finds that the following is just and right, having due regard for the rights of each party and the children of the marriage.

IT IS DECREED that the estate of the parties be divided as follows:

Petitioner is awarded the following as Petitioner's sole and separate property, and Respondent is hereby divested of all right, title, and interest in and to such property:

1. The 1969 Pontiac automobile

2. All household furnishings, appliances, fixtures, wearing apparel, jewelry, and other personal property in Petitioner's possession or subject to Petitioner's control.

Respondent is awarded the following as Respondent's sole and separate property, and Petitioner is hereby divested of all right, title, and interest in and to such property:

1. All household furnishings, appliances, fixtures, wearing apparel, jewelry, and other personal property in Respondent's possession or subject to Respondent's control.

IT IS DECREED that Petitioner and Respondent shall execute all instruments necessary to effect this decree and that Petitioner and Respondent have all appropriate and necessary writs, execution, and process, as many and as often as is necessary to accomplish the execution and final disposition of this judgment.

IT IS DECREED that all relief requested in this cause and not expressly granted herein be and is hereby denied.

SIGNED AND ENTERED this 21st day of January, 1977.

NEIL DANIEL
JUDGE PRESIDING

APPROVED AS TO FORM:

ROY HUDSPETH
Attorney for Petitioner

SAM MOORE
Attorney for Respondent

Endorsed: No. 11,210-DR, Divorce Decree, Recorded in Civil Minutes, January 21, 1977, Volumn U, page 63

APPENDIX A-2

NO. 11, 210-DR

IN THE MATTER OF THE MARRIAGE OF	§	IN THE 326TH
PATRICIA JEANETTE BOWEN AND	§	DISTRICT COURT
HERBERT LEE BOWEN, JR. AND IN THE INTEREST OF:	§	IN AND FOR
PATRICIA YVONNE BOWEN and STACEY LEE BOWEN,	§	TAYLOR COUNTY,
CHILDREN	§	TEXAS

DECREE OF COURT

On the 14th day of August, 1978, came forth the Petitioner HUBERT LEE BOWEN, JR., seeking a modification of prior orders of the Court in the same entitled and numbered cause as above.

Both Petitioner and Respondent, PATRICIA JEANETTE BOWEN, appeared in person and by attorney and announced ready for trial.

The Court, after examining the pleadings of counsel, and the papers of the cause, concluded the Court had jurisdiction, and therefore ordered Petitioner and Respondent to proceed.

A jury having been demanded, same was paneled and after Voir Dior of Petitioner and Respondent, twelve jurors were selected to hear this cause.

The trial then proceeded with questions of law being submitted to the Court and questions of fact submitted to the finder of the fact.

At the conclusion of the trial and after concluding argument of counsel, the jury was read the Court's charge and instructions, including definitions of the terms "preponderance of the evidence", "managing conservator", and the special instructions that the jury shall consider the qualifications of the respective parents without regard to the sex of the parent, and further the best interest of the children shall always be the primary consideration in answering the issues in determining the best interest of the children, the jury to consider the circumstances of the parents.

This cause was then submitted

to the jurors upon special issues, at which time, the jury was retired for deliberations.

Upon reaching a verdict in which ten jurors unanimously answered the special issues, said issues were answered in the following manner:

SPECIAL ISSUE NO. I

Do you find from a preponderance of the evidence that the circumstances of the children or parent have materially and substantially changed since the entry of the order of December 30, 1976, at which time the mother was appointed managing conservator of the children?

Answer "yes" or "no".

Answer Yes

If you have answered Special Issue number I "yes", then you will answer the following Special Issue number 2, otherwise, do not answer Special Issue number 2.

SPECIAL ISSUE NO. II

Do you find from a preponderance of the evidence that the retention of the mother as managing conservator of

the children would be injurious to the welfare of the children?

Answer "yes" or "no".

Answer Yes

If you have answered Special Issue number 2 "yes", then you will answer the following Special Issue number 3; otherwise, do not answer Special Issue number 3.

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that the appointment of the father or managing conservator of the children would be positive improvement for the children?

Answer "yes" or "no".

Answer Yes

Special Issues number 4 and 5 were not answered by the jury.

The Court then applied the law to the findings of fact and rendered the following decision.

The prior orders of this Court are modified to the extent that Mr. HUBERT LEE BOWEN, JR., Petitioner, becomes, and is now, managing conservator of the minor

children, PATRICIA YVONNE BOWEN and STACEY LEE BOWEN, with the rights and privileges granted to managing conservators under the Texas Family Code.

PATRICIA JEANETTE BOWEN, the Respondent in this cause, shall be and is now appointed the Possessory Conservator of said minor children with all the rights and privileges as defined by the Texas Family Code for possessory conservators.

The Court does not rule on the question of child support at this time.

The possessory conservator shall have all reasonable and seasonable visitation that may be agreed to between the managing and possessory conservator with said children.

In addition to reasonable visitation, as ordered, the possessory conservator shall have the following specific visitation periods with the children.

The managing conservator shall deliver to the possessory conservator

said children on the 1st and 3rd Saturday of each month, such visitation to begin at 9:00 a.m. and end the following Sunday evening at 6:00 p.m.

The possessory conservator shall deliver said children at the end of this specific visitation period.

Visitation as above ordered shall commence at 9:00 a.m. this 7th day of October, 1978, ending at 6:00 p.m. the following Sunday, such visitation continuing every 1st and 3rd Saturday thereafter as above ordered.

The possessory conservator shall be entitled to possession of said children for two weeks each summer, providing that she give the managing conservator at least one months notice of the date and time said possessory conservator wishes to take possession of the children.

The managing conservator shall deliver said children at the commencement of said summer visitation, and at the end of said two weeks visitation, the possessory conservator shall return

said children to the managing conservator.

The possessory conservator shall be entitled to possession of said children on Thanksgiving and Easter, as such holidays fall on odd numbered years. The managing conservator shall deliver said children on the eve of said holiday or in the alternative on such holiday no later than 9:00 a.m. to the possessory conservator.

The possessory conservator shall return said children to the managing conservator no later than 6:00 p.m. at the end of such holiday visitation unless other arrangements are agreed upon between the managing conservator and possessory conservator.

The managing conservator shall be entitled to said children at all other holidays, unless visitation is agreed upon between the Parties concerned.

The Possessory conservator shall have visitation with said children each Christmas, said period of visitation

beginning at 5:00 p.m. on the 23rd of December, and ending at 6:00 p.m. on the 24th day of December. The managing conservator shall deliver said children to the possessory conservator on these dates of Christmas visitation and the possessory conservator shall return said children to the managing conservator at the end of sale Christmas visitation period.

Respondent's right to have possession of the children may be denied by the managing conservator upon the illness of the children. However, the possessory conservator's right to possession and visitation shall resume upon the recovery of said children.

If, at any time, the possessory conservator has reason to doubt the sincerity of managing conservator's assertion that the child is too ill to be with the possessory conservator, then she may at her own expense ask a physician to visit the child and/or take said child or children to the physician.

ENTERED AND RENDERED this 9th day of November, 1978.

HENRY J. STRAUSS
JUDGE PRESIDING

APPROVED:

W. L. (DUB) BURKE, JR.
Attorney for Petitioner
P.O. Box 392
Abilene, TX 79604

WM. DALE DUPREE
Attorney for Respondent
221 Oak
Abilene, TX 79602

Endorsed: No. 11,210-DR, Decree of Court, Recorded in civil minutes in Volumn 1C page 888 November 9, 1978.

APPENDIX B

In re P. Y. B. and S. L. B

No. 5306 -- Appeal from Taylor County

In accordance with Section 11.19, Texas Family Code (1975), the parties will be identified by their initials. P. J. B., mother of P. Y. B. and S. L. B., appeals from the trial court's decree which named H. L. B., Jr., father of the minor children, as their managing conservator. The mother (appellant) had been named managing conservator at the time of divorce. Less than one year later, the father (appellee) filed a motion under Section 14.08, Texas Family Code (Supp.1978), seeking modification of that portion of the original order which named him possessory conservator and which named the children's mother as managing conservator. The jury's verdict may be summarized as follows: (1) the circumstances of the children or parent have materially and substantially changed since the entry of the Order which appointed the mother as managing

conservator of the children; (2) the retention of the mother as managing conservator would be injurious to the welfare of the children; and (3) the appointment of the father as managing conservator would be a positive improvement for the children.

Appellant argues four points of error, contending (1) that there is insufficient evidence to support the first two special issues; (2) that reversible error was committed when the father's attorney inquired as to events which occurred prior to the date of the original order; (3) that the trial court erred in using the "preponderance of the evidence" standard of proof; and (4) that the "best interest of the child" test is unconstitutionally vague. The decree is affirmed.

Appellant cites Watts v. Watts, 563 S.W.2d 314 (Tex.Civ.App. - Dallas 1978, writ ref'd n.r.e.), and Davis v. Duke, 537 S.W.2d 519 (Tex.Civ.App. - Austin 1976, no writ), in support of her contention under Point One that the

father, as moving party, failed to show the circumstances which existed when the original order was entered and that, therefore, there is insufficient proof as to a change in circumstances. We have examined the entire record, and we hold that there is sufficient evidence to show a material and substantial change of circumstances of the children from those which existed at the time of the divorce when compared to the circumstances which existed when the motion to modify conservatorship was filed. In re King's Estate, 244 S.W.2d 660 (Tex. 1951). No useful purpose would be served in summarizing the evidence. There was conflicting testimony, and the jury resolved the disputed issues.

In re Y., 516 S.W.2d 199 (Tex. Civ.App. - Corpus Christi 1974, writ ref'd n.r.e.), in discussing change of custody or conservatorship, stated the rule as follows:

> If there is evidence of probative force, from which reasonable minds might have come to the same conclusion that the jury

> came to, then there is evidence to support the findings of the jury. When all of the evidence has thus been considered and the evidence does not preponderate against the jury's finding, it is the duty of the trial court and of this court to enter and uphold the judgment in keeping with such findings.

See also Thompson v. Uzzell, 541 S.W.2d 499 (Tex.Civ.App. - Tyler 1976, no writ); Tye vs. Tye, 532 S.W.2d 124 (Tex.Civ.App. - Corpus Christi 1975, no writ); Wilkinson v. Evans, 515 S.W.2d 734 (Tex.Civ.App. - Dallas 1974, writ ref'd n.r.e.).

Appellant's second point of error claims that reversible error was committed when appellee, contrary to the Court's instructions, and over objections, consistently inquired into res judicata matters. The argument shows that appellant complains of the following matters, and we have quoted in full as to each matter of which complaint was made.

1. Statements to jury panel during voir dire examination.

...she has another child, a little girl by the name of C. (sic), she has these two children born as a result of the marriage to Mr. B. Now, as I understand at the present time, she has living with her the fourteen or fifteen year old daughter, W.; C. (sic), the five year old daughter, Y., who is three and a half; and S., who is two and a half....

There was no objection to these statements.

2. Questions by father's attorney to his first witness.

Q All right. Now, is J., to your knowledge, does she have any relationship with H. L. B. or M. B.?

A Not that I know of.

Q What about the little girl J., how did J. react to M.?

There were no objection to these questions.

3. Questions directed to the mother by the father's attorney.

Q All right. What was your pay scale there?

A Two sixty-five.

Q How many hours a week were you working?

A Thirty-two.

Q Where were you living at the time you and Mr. B. were divorced?

A On South 4th.

Q Do you remember the address?

A I do not remember the exact house number, no.

Q How long did you continue to live there?

A About two months

. . .

Q You had J., too?

A And my fifteen year old.

Q So, you had your fifteen year old daughter, a five year old daughter, J., Y., who is what, about three at that time, and S., who was two years old.

A Yes.

. . .

Q How much support do you draw on J.?

A J. is my child. I support her myself.

Q You don't draw any support on J. at all?

A No, sir.

There were no objections to these questions.

4. Questions directed to a neighbor of the father.

Q Are you familiar with a little girl by the name of J.?

A No, I have seen another little girl over there with them, but I don't know her.

There was no objection.

5. Questions directed to the wife of the father (the children's stepmother).

Q You can't testify to what anybody told you. My question was, why were you over there to see her?

A Because she was pregnant, she wasn't married, and she needed help.

Q All right. What kind of help were you trying to give her?

A Well, L. told me she needed baby clothes--

Q No, no, you can't testify to what L. said. I asked you, what kind of help were you trying to give her?

A Baby clothes.

OBJECTION BY MOTHER'S ATTORNEY: Your Honor, I think if he is discussing my client, I think we are getting back behind the decree of divorce, and I object to it. I request that the jury be instructed to disregard what she has already testified to, and that my objection be sustained.

THE COURT: I don't believe a time has been specified. I don't know what time you are talking about.

FATHER'S ATTORNEY: She said six or seven years ago. I asked her when she first met her and what the circumstances were then. It is prior to the divorce decree, but I think the jury is entitled to know how these folks all got together.

THE COURT: I sustain the objection as far as the latter remarks.

FATHER'S ATTORNEY: Note our objection.

. . .

Q Was J. there, or do you know?

A Well, I didn't see her.

6. Questions directed to the Child Welfare Department investigator by the father's attorney.

Q Did you determine that one of the children was born out of wedlock?

OBJECTION BY MOTHER'S ATTORNEY: I object to that, Your Honor. That is going behind the decree of divorce.

FATHER'S ATTORNEY: Judge, he has asked for her opinion, and I asked him what he based it on. I think that is a proper question.

THE COURT: All right.

FATHER'S ATTORNEY: Could we ask the Jury to be excused so I can dictate a bill for that?

THE COURT: Would you wait until you are through with the witness?

FATHER'S ATTORNEY: Note our exception to that, Your Honor. I believe you sustained the objection.

MOTHER'S ATTORNEY: We ask you to instruct the Jury to disregard that last question asked by counsel.

THE COURT: I instruct the Jury to disregard the last remark.

MOTHER'S ATTORNEY: The last remark concerning Mrs. B.'s children. That was the remark I am referring to.

THE COURT: The Jury will not consider that remark.

MOTHER'S ATTORNEY: I would further move for a mistrial, Your Honor.

THE COURT: I overrule the motion for a mistrial.

MOTHER'S ATTORNEY: Thank you.

Q In taking your history and making your evaluation, Mr. O., do they teach you in school, and does Child Welfare suggest that you determine whether or not the children living in a home come from more than one father?

A Yes.

Q And in making your study with Mrs. B., did you undertake to determine who the father of the children were?

A Yes.

Q And who did you determine to be the father of her children?

A Okay. Let's see. Okay. W.E.G. is the father of W. and J.

Q Did you determine whether or not J. was living in the home with her mother.

A. J. was not living at home.

Q Did you investigate and determine why she was not living in the home?

OBJECTION BY MOTHER'S ATTORNEY: I am going to object to that, Your Honor. We are getting behind the decree of divorce again, and I think that is irrelevant.

FATHER'S ATTORNEY: I am not asking whether he found out, I am asking whether he investigated it, Judge.

MOTHER'S ATTORNEY: I think that is objectionable.

THE COURT: Just ask the question and then answer it.

Q Did you investigate the reason that J. was not living with her mother?

A I don't have that reflected here.

. . .

Q All right.

A There is one other child born to P., J.A.G.

Q Did you determine the father of that child?

OBJECTION BY MOTHER'S ATTORNEY: I am going to again object, Your Honor. I think this is getting pretty close to my motion, and I am going to enter my objection.

THE COURT: I sustain the objection.

7. Questions directed to former co-worker of mother by father's attorney.

Q All right. Do you recall approximately when it was that M.B. first met P.B.?

A When P. was pregnant with her first child named J. P. had came and she told me that she was pregnant with J., which we wouldn't know what the child's name was going to be at the time of it, and she said that her family had disowned her, and that they weren't going to have anything to do with her because they were disappointed what had happened because she was not married, and she said that she didn't know what she was going to do--

OBJECTION BY MOTHER'S ATTORNEY: I am objecting to this. We are getting behind the decree of divorce.

FATHER'S ATTORNEY: Let me withdraw it. Let me ask another question.

THE COURT: Listen to the question and just answer the question and don't volunteer anything. (There

was no motion for mistrial. There was no request for an instruction to disregard the nonresponsive answer.)

We note that every objection made by appellant's attorney was sustained. The court instructed the jury to disregard certain statements when requested. We fail to find that the trial court committed error. TEX.R.CIV.P. 434.

Appellant's third point of error asserts error by the trial court in using the "preponderance of the evidence" standard rather than a "clear and convincing" standard in the trial of this case. Appellant relies upon Holley v. Adams, 544 S.W.2d 367 (Tex. 1976); Wiley v. Spratlin, 543 S.W.2d 349 (Tex. 1976); Spencer v. State, 466 S.W.2d 749 (Tex.Cr.App. 1971); Hall v. Harris County Child Welfare Unit, 533 S.W.2d 121 (Tex.Civ.App. - Houston (14th Dist) 1976, no writ); Sims v. State Department of Public Welfare, 438 F.Supp. 1179 (U.S.D.C. - S.D.Tex.1977). Those cases do not support the position urged by appellant.

Holley, Wiley and Hall were suits for termination of the parent-child relationship under Section 15.02, Texas Family Code (1973). This appeal concerns a change of conservatorship under Section 14.08, Texas Family Code (Supp.1976). As Justice Pope pointed out in Wiley:

> Suits for conservatorship, possession, and support are governed by Chapter 14 of the Family Code and those matters are determined by the "best interest" test. Section 14.07. Those proceedings are different and have different purposes from termination cases. Decrees under Chapter 14 may be modified or changed from time to time, but the parent still retains some rights in and control over a child. A termination decree, on the other hand, is complete, final, irrevocable. It divests for all time the parent and child of all legal rights, privileges, duties, and powers with respect to each other except for the child's right to inherit. See Section 15.07. The difference in the proceedings justifies the caution with which courts have characteristically considered termination cases.

Spencer was a case by the Texas Court of Criminal Appeals which discussed the burden of proof in a criminal case

on the question as to whether the witness's identification of a defendant is tainted by an earlier improper identification of the defendant at a police line-up.

Sims held several sections of the Texas Family Code to be unconstitutional, but it did not discuss Section 14.08, Texas Family Code (Supp.1978), which is involved in this appeal. Sims is not controlling. See also Woodard v. Texas Department of Human Resources, 573 S.W.2d 596 (Tex.Civ.App. - Amarillo 1978, writ ref'd n.r.e.).

Appellant's fourth point claims that the "best interest of the child" test is unconstitutionally vague. We disagree. Section 14.07(a), Texas Family Code (1975), expressly provides that: "The best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship...." Appellant cites no cases holding that this standard is unconstitutional, and we know of none.

All of the points of error have been considered. Each is overruled. The Decree of Court dated November 9, 1978, is affirmed. It is further ordered that this opinion not be published in accordance with Tex.R.Civ.P. 452.

BOB DICKENSON

ASSOCIATE JUSTICE

May 24, 1979

APPENDIX C

CLERK'S OFFICE - SUPREME COURT

Austin, Texas Oct. 31, 1979

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of IN RE P.V.B. and S.L.B., No. B-8652 was this day refused. No reversible error.

Very truly yours,
GARSON R. JACKSON, CLERK

CLERK'S OFFICE - SUPREME COURT

Austin, Texas Jan. 30, 1980

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of IN RE P.V.B. & S.L.B., No. B-8652 was this day overruled.

Very truly yours,
GARSON R. JACKSON, CLERK

APPENDIX D

TEXAS FAMILY CODE

§11.15. Findings

The court's findings shall be based on a preponderance of the evidence under rules generally applicable to civil cases.

§14.07. Best Interest of Child

(a) The best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession, and support of and access to the child. If the child is 14 years of age or older, he may, by writing filed with the court, choose the managing conservator, subject to the approval of the court.

(b) In determining the best interest of the child, the court shall consider the circumstances of the parents. In the event of the death of the parents, the grandparents may be considered but such consideration shall not alter or diminish the discretionary power of the court.

(c) In a nonjury trial the court may interview the child in chambers to ascertain the child's wishes as to his conservator. Upon the application of any party and when the issue of managing conservatorship is contested, the court shall confer with a child 12 years of age or older and may confer with a child under 12 years of age, but in either event the results of such interview shall not alter or diminish the discretionary power of the court. The court may permit counsel to be present at the interview. On the motion of a party or on the court's own motion, the court shall cause a record of the interview to be made when the child is 12 years of age or older, which record of the interview shall be made part of the record in the case.

§14.08. Modification of Order

(a) A court order or the portion of a decree that provides for the support of a child or the appointment of a conservator or that sets the terms and conditions of conservatorship for,

support for, or access to a child may be modified only by the filing of a motion in the court having jurisdiction of the suit affecting the parent-child relationship. Any party affected by the order or the portion of the decree to be modified may file the motion.

(b) Each party whose rights, privileges, duties, or powers may be affected by the motion is entitled to at least 30 days' notice of a hearing on the motion to modify.

(c) After a hearing, the court may modify an order or portion of a decree that:

(1) designates a managing conservator if the circumstances of the child or parent have so materially and substantially changed since the entry of the order or decree to be modified that the retention of the present managing conservator would be injurious to the welfare of the child and that the appointment of the new managing conservator would be a positive improvement for the child; or

(2) provides for the support of a child, sets the terms and conditions for access to or possession of a child, or prescribes the relative rights, privileges, duties, and powers of conservators if the circumstances of the child or a person affected by the order or portion of the decree to be modified have materially and substantially changed since the entry of the order or decree; except that an order providing for the support of a child may be modified only as to obligations accruing subsequent to the motion to modify.

(d) If the motion is filed for the purpose of changing the designation of the managing conservator and is filed within one year after the date of issuance of the order or decree to be modified, there shall be attached to the motion an affidavit executed by the person making the motion. The affidavit must contain at least one of the following allegations along with the supportive facts:

(1) that the chld's present environment may endanger his physical

health or significantly impair his emotional development; or

(2) that the managing conservator is the person seeking the modification or consents to the modification, and the modification is in the best interest of the child.

(e) On the filing of a motion to which the provisions of Subscetion (d) of this section apply, the court shall deny the motion and refuse to schedule a hearing unless the court determines, on the basis of the affidavit, that adequate facts to support an allegation listed in Subdivision (1) or (2) of Subsection (d) of this section are stated in the affidavit. If the court determines that the facts stated are adequate to support an allegation, a time and place for the hearing shall be set.

APPENDIX E

NO. B-8625

IN RE: P. Y. B. § IN THE SUPREME COURT
AND
S. L. B. § OF TEXAS AT
CHILDREN § AUSTIN, TEXAS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that PATRICIA JEANETTE BOWEN, the Appellant in the above-entitled and numbered cause, hereby appeals to the Supreme Court of the United States from the final judgment of the Texas Supreme Court affirming the decision of the Eastland Texas Court of Civil Appeals, Eleventh Supreme Judicial District, entered in this suit on the 30th day of January, 1980, holding that a child custody suit should be tried by a preponderance of the evidence and not upon a clear and convincing rationale, and that "Best Interest" test is constitutional, as per Chapter 11.15 and Chapter 14, Texas Family Code.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, Subparagraph 2.

DATED this 21 day of February, 1980.

WILLIAM D. DUPREE
Attorney for Appellant
West Texas Legal Services
Lawyers Building
100 Main Street
Fort Worth, Texas 76102
(817) 336-3943

CERTIFICATE OF SERVICE

I, WILLIAM D. DUPREE, a member of the Bar of the Supreme Court of the United States and counsel of record for PATRICIA JEANETTE BOWEN, Appellant herein, hereby certify that on the 21 day of Feb, 1980, pursuant to Rule 33, Rules of the Supreme Court, served three copies of the foregoing Notice of Appeal to the Supreme Court of the United States on each of the parties herein, as follows:

Mr. Dub Burke
Attorney for Appellee
P.O. Box 392
Abilene, Texas 79604;

Hon Mark White
Attorney General
State Capitol
Austin, Texas 78711

by depositing such copies in the United States Mail, Fort Worth, Texas, with first class postage, prepaid, properly addressed to the Post Office address of the said Mr. Dub Burke, attorney of record for Appellee, and the Honorable Mark White, Attorney General, State of Texas at Austin, Texas.

All parties required to be served have been served.

DATED this 21 day of Feb, 1980.

WILLIAM D. DUPREE

CLERK'S OFFICE - SUPREME COURT

Austin, Texas, Feb. 25, 1980

Dear Sir:

In the case of B-8652, In Re: P.V.B. and S.L.B Notice of Appeal to the U. S. Supreme Court was this day received and filed.

Very truly yours,

GARSON R. JACKSON, Clerk